No. 643

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

BERT O. PETERSON AND MIDWEST HOLDING COMPANY, A CORPORATION,

Petitioners,

vs.

HAROLD L. ICKES, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; OSCAR L. CHAPMAN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF THE INTERIOR; AND FRED W. JOHNSON, INDIVIDUALLY AND AS COMMISSIONER OF THE GENERAL LAND OFFICE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONERS

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Opinion Below

The district court's memorandum (R. 68) is not reported. The opinion of the Court of Appeals (R. 71-74) is reported in 151 F. (2d) 301.

Jurisdiction

The judgment of the Court of Appeals was filed July 2, 1945 (R. 75). A petition for rehearing was denied on September 10, 1945 (R. 82), and the petition for a writ of certiorari was filed on December 7, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Statute Involved

The statute directly involved in this controversy is Section 17 of the Act of February 25, 1920; Chap. 85, Sec. 17, 41 Stat. 443, as amended by the Act of August 21, 1935, 49 Stat. 674, Sec. 17; Title 30, Sec. 226, United States Code, which provides:

> "• • •
>
> "Any lease issued after August 21, 1935, under the provisions of this section, except those earned as a preference right as provided in section 223 of this title, shall be subject to cancellation by the Secretary of the Interior *after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease,* unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. *Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record postoffice address,* and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be cancelled only in the manner provided in section 188 of this title." (Italics supplied.)

Statement

The purpose of this reply brief is to correct certain incorrect inferences, statements of fact and legal conclusions contained in respondents' brief. They are discussed immediately following.

Argument

In their brief (p. 8) respondents infer that post office records showing delivery of the Peterson July 14, 1941, letter to Midwest was evidence before the Department. This is incorrect. While the decision of the Secretary affirming the Commissioner's decision states that the records of the Postmaster at Billings, Montana, show the receipt of a letter from Bert O. Peterson to Midwest Holding Company on July 28, 1941, and the delivery of this letter to E. A. Wight, on August 1, 1941 (R. 22), *these records form no part of the record before the Department* (R. 79). Furthermore the Secretary's assumption that it was the same letter as that written by Peterson to *John Wight* on July 14, 1941, is erroneous because it cannot be properly assumed that that letter took fourteen days to reach Billings, Montana, from Armstrong, Iowa, and also because the Peterson letter of July 14, 1941, advising of the proposed cancellation was addressed to John Wight and not to Midwest Holding Company or E. A. Wight, to whom the Secretary of the Interior says delivery was made (R. 79-80).

Respondents state in their brief (pp. 8-9) that the petition herein does not in terms controvert the statement of the lower court with respect to the administrative finding of actual notice in Midwest, that "It is not argued that this finding lacks evidence to support it." This is not correct. It is specifically stated in the petition (P. 7) that counsel for Petitioner argued before the lower court

that this finding of the Secretary "lacked evidence to support it."

At Page 11 of their brief respondents state:

> "* * * It is submitted, moreover, that the Secretary's determination that the operating agreement was not an assignment is of a type which should not in any event be disturbed by the courts. *Choate* v. *Commissioner*, 324 U. S. 1.
>
> Furthermore, while petitioners' complaint purports to be one for a declaratory judgment, it actually seeks coercive relief (R. 9). And where, as here, it is sought by judicial proceedings to compel an administrative officer to apply a given construction to a statute, the courts will consider only whether the construction adopted by the officer is clearly wrong; if it is not, the administrative determination will be sustained. *Hall* v. *Payne*, 254 U. S. 343, 347-348; *Wilbur* v. *United States*, 281 U. S. 206, 219."

Petitioners do not believe that these are proper questions to be raised at this stage of the proceedings but should be considered when the case is before this Court on its merits after the writ is granted. However, since respondents have raised these questions, it is pointed out that the *Choate* case is not in point. It holds that a determination of the Tax Court that the parties intended a cash sale of equipment is not open for redetermination by this Court, but is the kind of an issue reserved for the Tax Court. It has nothing to do with a determination of the Secretary of the Interior as to who is a "lease owner" under the Mineral Leasing Act.

The requirement of the Mineral Leasing Act calls for the performance of a ministerial act on the part of the Secretary of the Interior of a character long recognized as reviewable by the courts. *Wilbur, Secretary of the Interior*, v. *United States ex rel. Krushnic*, 280 U. S. 306.

In that case, as at bar, the interpretation and application of the *Mineral Leasing Act* of February 20, 1920, was drawn in question. Paralleling the controversy at bar there the Secretary of the Interior had applied the terms of that statute in such a way as to hold invalid and void the placer mining claim of the relator Krushnic.

The question common to both that case and the one at bar is whether the Secretary applied to the facts before him the plain language of the controlling statute. In that case this Court directed the issuance of a writ of mandate upon this ground (280 U. S. 319):

> "In this case, the Secretary interpreted and applied a statute in a way contrary to its explicit terms, and, in so doing, departed from a plain official duty."

Reliance was had in reaching this conclusion upon the earlier language of the court in *Roberts* v. *United States*, 176 U. S. 221, 20 Sup. Ct. Rep. 376, 44 L. Ed. 443, which we quote here as the rule in point (176 U. S. 231):

> "* * * Every statute to some extent required construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might suc-

cessfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

See to the same point

Ballinger v. *United States ex rel. Frost*, 216 U. S. 240;
Lane v. *Hoglund*, 244 U. S. 174;
Work v. *United States ex rel. Lynn*, 266 U. S. 161;
Work, Secretary of the Interior, v. *United States ex rel. McAlester-Edwards Coal Company*, 262 U. S. 200;
Work, Secretary of the Interior, v. *United States ex rel. Mosier*, 261 U. S. 352;
Garfield, Secretary of the Interior, v. *United States ex rel. Goldsby*, 211 U. S. 249.

It is manifest that at bar the discretion of the Secretary of the Interior, exercised as he sees the public interest, to cancel out the Peterson lease is in nowise to be controlled or restrained. But after that discretion is exercised, the court is to declare whether the Secretary has followed the statute in effecting the cancellation. Such is, indeed, the very function of the judiciary itself, which in nowise infringes upon the prerogatives of the executive.

Conclusion

The necessary conclusion to be drawn from the admitted facts at bar is that the Secretary of the Interior did not follow the plain command of *Section* 17 of the *Mineral*

Leasing Act, as amended, in attempting a cancellation of the Peterson lease. Absent notice by registered mail to the appellant company as a "lease owner" within the sweep of this statute, there has been no cancellation certainly as to it.

Accordingly, the Secretary and the Department are under the plain, legal duty to recognize the lease in issue as valid; that is, certainly as to Midwest and its rights under its operating agreement and until compliance be had with the statute.

The petition should be granted.

Respectfully submitted,

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